

SOUTH AFRICA / JUDGMENT

Competition Commission v NWK Ltd (43/CR/Jun11) [2011] ZACT 93; [2012] 1 CPLR 98 (CT) (9 November 2011) [2011] ZACT 93

COURT
Competition Tribunal

BEFORE
A Wessels, M Mokuena, A Ndoni

CASE / FILE NUMBER
43/CR/Jun11

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COMPETITION TRIBUNAL

REPUBLIC OF SOUTH AFRICA

Case No:43/CR/Jun11

In the matter between:

The Competition CommissionApplicant

and

NWK Ltd

Respondent Panel

A Wessels (Presiding Member), M Mokuena (Tribunal Member), and A Ndoni (Tribunal Member)

Heard on :

09 November 2011

Decided on :

09 November 2011

Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A".

Presiding Member

A Wessels

Concurring: M Mokuena and A Ndoni

'ANNEXURE"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

HELD IN PRETORIA

CT Case No.

CC Case No. 2009Mar4349

THE COMPETITION COMMISSION Applicant

NWK LIMITED 3rd Respondent

In re:

AFGRI OPERATIONS LIMITED 1st Respondent

SENWES LIMITED NWK LIMITED 2nd Respondent

OVK OPERATIONS LIMITED 3rd Respondent

SUIDWES (PTY) LIMITED 4th Respondent

VRYSTAAT KOOPERASIE BEPERK 5th Respondent

OVERBERG AGRI (PTY) LIMITED 6th Respondent

DIE HUMANSDORPSE KOOPERASIE BEPERK 7th Respondent

SENTRAAL-SUID KOOPERASIE BEPERK 8th Respondent

GWK LIMITED 9th Respondent

KAAP AGRI BEDRYF LIMITED 10th Respondent

MGK BEDRYFSMAATSKAPPY (PTY) LIMITED 11th Respondent

TUINROETE AGRI BEPERK 13th Respondent

MOREESBURGSE KORINGBOERE (EDMS) BEPERK 14th Respondent

TWK LANDBOU BEPERK 15th Respondent

NTK LIMPOPO AGRIC BEPERK 16th Respondent

GRAIN SILO INDUSTRY (PTY) LIMITED 17th Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(a){iii} and 58(1)(b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION ("THE COMMISSION") AND NWK LIMITED ("NWK"), IN RESPECT

OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(f) OF THE COMPETITION ACT, 1998 ("THE ACT"). The Commission and NWK hereby agree that application be made to the Tribunal for the confirmation of this Consent Agreement in terms of section 58 (1)(a)(iii) as read with section 58(1)(b) of the Competition Act, 1998 (Act No. 89 of 1998), as amended, on the terms set out below; 1. Definitions For the purposes of this Consent Agreement the following definitions shall apply: 1.1. "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended; 1.2. "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal

place of business at 1st Floor, Muiayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng; 1.3. "Commissioned" means the Commissioner of the Commission, appointed in terms of section 22 of the Act; 1.4. "Complaint" means the complaint under case number 2009Mar4349 initiated by the Commissioner in terms of section 49B of the Act, including a complaint concerned with allegations of price fixing in terms of section 4(1)(b)(i) of the Act initiated on 17 March 2009 as well as an expanded initiation on 25 May 2010 after the decision was made to include all the members and shareholders of the Grain Silo Industry; 1.5. "Consent Agreement" means this agreement duly signed and concluded between the Commission and NWK; 1.6. "Grain Silo industry (Pty) Ltd" is a private company duly incorporated in accordance with the company laws of the Republic of South Africa, having its registered office at the Grain Building, 477 Witherite Street, The Wilgers, Pretoria, Gauteng Province. The GSI represents its members in public forums wherein matters related to the handling and storage of grain and oilseeds are discussed and provides specialist research services that members may request on an ad-hoc basis. The GSI represents its constituent members in interactions with the Agricultural Products Division of the Johannesburg Stock Exchange (the "APD" previously "SAFEX"). 1.7. "NWK" means NWK Limited, a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration

number 1998/007577/06 and with its registered address, alternatively principal place of business at 81 Scholtz Street, Lichtenburg, 2740, South Africa; 1.8. "Parties" means the Commission and NWK; 1.9. "Respondent" means for purposes of this agreement NWK; 1.10. "Respondents" means Respondents one (1) to seventeen (17) described above; 1.11. "SAFEX" means the South African Futures Exchange which was established to provide market participants with a price determination mechanism and a price risk management facility through which they can manage their exposure to adverse price movements in the underlying commodity. 1.12. "Tribunal" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal

place of business at 3rd Floor, Mulayo building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

CONSENT AGREEMENT IN TERMS OF SECTION 49D READ WITH SECTION 58(1)(a){iii} and 58(1)(b) OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION ("THE COMMISSION") AND NWK LIMITED ("NWK"), IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(f) OF THE COMPETITION ACT, 1998 ("THE ACT").

The Commission and NWK hereby agree that application be made to the Tribunal for the confirmation of this Consent Agreement in terms of section 58 (1)(a)(iii) as read with section 58(1)(b) of the Competition Act, 1998 (Act No. 89 of 1998), as amended, on the terms set out below;

1. Definitions

For the purposes of this Consent Agreement the following definitions shall apply:

1.1. "Act" means the Competition Act, 1998 (Act No. 89 of 1998), as amended;

1.2. "Commission" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal

place of business at 1st Floor, Muiayo Building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

1.3. "Commissioner" means the Commissioner of the Commission, appointed in terms of section 22 of the Act;

1.4. "Complaint" means the complaint under case number 2009Mar4349 initiated by the Commissioner in terms of section 49B of the Act, including a complaint concerned with allegations of price fixing in terms of section 4(1)(b){i} of the Act initiated on 17 March 2009 as well as an expanded initiation on 25 May 2010 after the decision was made to include all the members and shareholders of the Grain Silo Industry;

1.5. "Consent Agreement" means this agreement duly signed and concluded between the Commission and NWK;

1.6. "Grain Silo industry (Pty) Ltd" is a private company duly incorporated in accordance with the company laws of the Republic of South Africa, having its registered office at the Grain Building, 477 Witherite Street, The Wilgers, Pretoria, Gauteng Province. The GSi represents its members in public forums wherein matters related to the handling and storage of grain and oilseeds are discussed and provides specialist research services that members may request on an ad-hoc basis. The GSI represents its constituent members in interactions with the Agricultural Products Division of the Johannesburg Stock Exchange (the "APD" previously "SAFEX").

1.7. "NWK" means NWK Limited, a company registered and incorporated in accordance with the laws of the Republic of South-Africa with registration

number 1998/007577/06 and with its registered address, alternatively principal place of business at 81 Scholtz Street, Lichtenburg, 2740, South Africa;

1.8. "Parties" means the Commission and NWK;

1.9. "Respondent" means for purposes of this agreement NWK;

1.10. "Respondents" means Respondents one (1) to seventeen (17) described above;

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place of business at 3rd Floor, Mulayo building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. The Complaint and Complaint Investigation 2.1. On 17 March 2009 the Commissioner initiated a complaint against Afgri Operations Limited ("Afgri"), Senwes Limited ("Senwes"), NWK Limited ("NWK"),

OVK Operations Limited ("OVK"), Suidwes (Pty) Limited ("Suidwes"), Vrystaatse Kooperasie Limited ("VKB")

and the Grain Silo industry ("GSI") for alleged contravention of section 4(1)(b)(i) of the Act. 2.2. The investigation revealed that the storage rate is agreed to and assented to not only by the entities against whom the original

complaints initiation was made, but by all members and shareholders of GSI. In the circumstances, on 25 May 2010 the Commissioner expanded the investigation to refer to all seventeen (17) respondents. 2.3. The Commission conducted its investigation and concluded that the respondents and GSI have contravened section 4(1)(b)(i) of the Act. The essence of the conduct complained of is that the respondents and GSI have contravened section 4(1)(b)(i) of the Act in that they fix the prices of the daily storage tariff for the storage of grain. This is done for application throughout the Republic. The first to sixteenth respondents are all former cooperatives who own grain storage silos and provide other agricultural services and are competitors in the market for grain storage. 2.4. The Commission found that: 2.4.1. Notwithstanding the fact that they are competitors, the first to sixteenth respondents are all shareholders or members of the GSL Although the GSI is a private company, it amounts to an industry association for members of the grain storage industry. SAFEX placed the onus for the determination of the storage rate on the GSI on the basis that it had the necessary knowledge and understanding of the costs involved in providing storage. Until 2008, SAFEX requested the standardised tariff from the GSI on an annual basis. In 2008, as is set out below, the GSI declined to provide the standardised storage tariff to SAFEX any longer on account of the Commission's

contentions that it and its members were contravening section 4(1)(b)(i) of the Act. 2.4.2. It was the GSI's technical committee that was responsible for fixing the daily storage tariff on behalf of the GSI and its members. In response to requests from SAFEX, the GSI consulted its shareholders. The shareholders submitted individual proposals as to the appropriate storage rate to GSL. These rates were collated and evaluated by the GSI's technical committee, the members of which are from competing silo companies. The technical committee then decided on a rate and this was then submitted to SAFEX on behalf of GSI and its shareholders. The essence of the conduct complained of is that the daily storage tariff proposed by GSi is agreed to and assented to by ail ofJfTe

2. The Complaint and Complaint Investigation

2.1. On 17 March 2009 the Commissioner initiated a complaint against Afgri Operations Limited ("Afgri"), Senwes Limited ("Senwes"), NWK Limited ("NWK"),

OVK Operations Limited ("OVK"), Suidwes (Pty) Limited ("Suidwes"), Vrystaatse Kooperasie Limited ("VKB")

and the Grain Silo industry ("GSI") for alleged contravention of section 4(1)(b)(i) of the Act.

2.2. The investigation revealed that the storage rate is agreed to and assented to not only by the entities against whom the original

complaints initiation was made, but by all members and shareholders of GSI. In the circumstances, on 25 May 2010 the Commissioner expanded the investigation to refer to ail seventeen (17) respondents.

2.3. The Commission conducted its investigation and concluded thatthe respondents and GSI have contravened section 4(1)(b)(i) of the Act. The essence of the conduct complained of is that the respondents and GSI have contravened section 4(1)(b)(i) of the Act in that they fix the prices of the daily storage tariff for the storage of grain. This is done for application throughout the Republic. The first to sixteenth respondents are all former cooperatives who own grain storage silos and provide other agricultural services and are competitors in the market for grain storage.

2.4. The Commission found that:

2.4.1. Notwithstanding the fact that they are competitors, the first to sixteenth respondents are all shareholders or members of the GSL. Although the GSI is a private company, it amounts to an industry association for members of the grain storage industry. SAFEX placed the onus for the determination of the storage rate on the GSI on the basis that it had the necessary knowledge and understanding of the costs involved in providing storage. Until 2008, SAFEX requested the standardised tariff from the GSI on an annual basis. In 2008, as is set out below, the GSI declined to provide the standardised storage tariff to SAFEX any longer on account of the Commission's contentions that it and its members were contravening section 4(1)(b)(i) of the Act.

2.4.2. It was the GSI's technical committee that was responsible for fixing the daily storage tariff on behalf of the GSI and its members. In response to requests from SAFEX, the GSI consulted its shareholders. The shareholders submitted individual proposals as to the appropriate storage rate to GSI. These rates were collated and evaluated by the

GSI's technical committee, the members of which are from competing silo companies. The technical committee then decided on a rate and this was then submitted to SAFEX on behalf of GSI and its shareholders.

The essence of the conduct complained of is that the daily storage tariff proposed by GSI is agreed to and assented to by all of the

respondents. Given that the first to sixteenth respondents are all competitors in the provision of storage services, the joint determination of the daily storage rate amounts to prohibited price fixing in that it quite simply amounts to an agreement between firms in a horizontal relationship for the direct fixing of storage prices. The manner in which the SAFEX storage tariff is determined is, in the Commission's view, restrictive of competition. In addition to agreeing to the SAFEX rate, the respondents exchanged detailed cost information. In addition, the storage tariff determined for SAFEX purposes has been used to determine storage fees in respect of sales transactions in the physical market. This amounts to collusion. The Commission took a decision to refer to the Tribunal its complaint that is described above.

3. Statement of conduct by NWK NWK admits that it participated, as a member of the GSI, in furnishing the GSI with information requested by the South African Futures Exchange in order to fix the daily grain storage tariff which could be interpreted as a contravention of section 4(1)(b)(i) of the Act as described above.

4. Administrative Penalty 4.1. Having regard to the provisions of sections 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, NWK accepts that a contravention of section 4(1)(b)(i) may lead to the imposition of an administrative penalty where the Tribunal deems it appropriate.

4.2. The parties have agreed that NWK will pay an administrative penalty in the amount of R3 295 158,08.

4.3. This amount constitutes 4% (four per cent) of the total grain silo storage turnover for the 2009 financial year.

4.4. NWK will pay the amount set out in paragraph 4.2 above to the Commission within 10 (ten) days of confirmation of this Consent Agreement by the Tribunal.

4.5. This payment shall be made into the Commission's bank account, details of which are as follows:
Bank name: Absa Bank Branch name: Pretoria Account holder: Competition Commission Fees Account
Account number: 4050778576 Account type: Current Account Branch Code: 323 345

respondents. Given that the first to sixteenth respondents are all competitors in the provision of storage services, the joint determination of the daily storage rate amounts to prohibited price fixing in that it quite simply amounts to an agreement between firms in a horizontal relationship for the direct fixing of storage prices.

The manner in which the SAFEX storage tariff is determined is, in the Commission's view, restrictive of competition. In addition to agreeing to the SAFEX rate, the respondents exchanged detailed cost information. In addition, the storage tariff determined for SAFEX purposes has been used to determine storage fees in respect of sales transactions in the physical market. This amount to collusion.

The Commission took a decision to refer to the Tribunal its complaint that is described above.

3. Statement of conduct by NWK

NWK admits that it participated, as a member of the GSI, in furnishing the GSI with information requested by the South African Futures Exchange in order to fix the daily grain storage tariff which could be interpreted as a contravention of section 4(1)(b)(i) of the Act as described above.

4. Administrative Penalty

4.1. Having regard to the provisions of sections 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, NWK accepts that a contravention of section 4(1)(b)(i) may lead to the imposition of an administrative penalty where the Tribunal deems it appropriate.

4.2. The parties have agreed that NWK will pay an administrative penalty in the amount of R3 295 158,08.

4.3. This amount constitutes 4% (four per cent) of the total grain silo storage turnover for the 2009 financial year.

4.4. NWK will pay the amount set out in paragraph 4.2 above to the Commission within 10 (ten) days of confirmation of this Consent Agreement by the Tribunal.

4.5. This payment shall be made into the Commission's bank account, details of which are as follows:

Bank name: Absa Bank

Branch name: Pretoria

Account holder: Competition Commission Fees Account

Account number: 4050778576

Account type: Current Account

Branch Code: 323 345

4.6. The payment will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act. 5. Agreement Concerning Future Conduct 5.1. NWK agrees to fully cooperate with the Commission in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, NWK specifically agrees to: 5.1.1. Testify in the complaint referral (if any) in respect of alleged contraventions covered by this Consent Agreement; and 5.1.2. To the extent that it is in existence, provide evidence, written or

otherwise, which is in its possession or under its control, concerning the alleged contraventions contained in this Consent Agreement. 5.2. NWK agrees that it will in future refrain from the provision of contractual undertakings that have the potential to constitute contraventions of section 4(1)(b) of the Act. 5.3. NWK shall continue with developing, implementing and monitoring its competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the

Competition Act. In particular, NWK shall: 5.3.1. continue to implement a competition policy and compliance programme; 5.3.2. continue to provide training on competition law compliance on issues particularly relevant to NWK and its employees and officials; 5.3.3. update the competition policy and training annually after confirmation of this Consent Order and continue to do so on an annual basis to ensure NWK's continued compliance with the Act. 5.4. NWK shall submit a copy of its compliance programme to the Commission within 60 days of the date of confirmation of the Consent Agreement by the Tribunal. 6. Full and Final Settlement

4.6. The payment will be paid over by the Commission to the National Revenue

Fund in accordance with section 59(4) of the Act.

5. Agreement Concerning Future Conduct

5.1. NWK agrees to fully cooperate with the Commission in relation to the prosecution of the complaint referral. Without limiting the generality of the foregoing, NWK specifically agrees to:

5.1.1. Testify in the complaint referral (if any) in respect of alleged contraventions covered by this Consent Agreement; and

5.1.2. To the extent that it is in existence, provide evidence, written or otherwise, which is in its possession or under its control, concerning the alleged contraventions contained in this Consent Agreement.

5.2. NWK agrees that it will in future refrain from the provision of contractual undertakings that have the potential to constitute contraventions of section 4(1)(b) of the Act.

5.3. NWK shall continue with developing, implementing and monitoring its competition law compliance programme incorporating corporate governance designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the

Competition Act. In particular, NWK shall:

5.3.1. continue to implement a competition policy and compliance programme;

5.3.2. continue to provide training on competition law compliance on issues particularly relevant to NWK and its employees and officials;

5.3.3. update the competition policy and training annually after confirmation of this Consent Order and continue to do so on an

annual basis to ensure NWK's continued compliance with the Act.

5.4. NWK shall submit a copy of its compliance programme to the Commission within 60 days of the date of confirmation of the Consent Agreement by the Tribunal.

6. Full and Final Settlement

This agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and NWK relating to any alleged contravention by the Respondents of the Act that is the subject of XheCommission's investigation under case no. 2009MAR4349. Dated and signed at Lichtenburg on the 14th day of June 2011. For NWK Managing Director Dated and signed at Pretoria on the 23rd day of June 2011. For the Commission Competition Commissioner

This agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings between the Commission and NWK relating to any alleged contravention by the Respondents of the Act that is the subject of XheCommission's investigation under case no. 2009MAR4349.

Dated and signed at Lichtenburg on the 14th day of June 2011.

For NWK

Managing Director

Dated and signed at Pretoria on the 23rd day of June 2011.

For the Commission

Competition Commissioner

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Prepared on 11 October 2026 · Esheria